No. 152.

Supreme Court of the United States.

Brief of Porter for D. C.

Filed Dec. 4, 1902.

COMMERCIAL PUBLISHING COMPANY,
Plaintiff in Error,

against

SAMUEL C. BECKWITH,
Defendant in Error.

No. 152.
October Term,
1902.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

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1902.

IN THE

APPEAL PRINTING CO., 24-26 Vesey Street N. Y.

IN THE

Supreme Court of the United States.

WRIT OF ERROR FROM NEW YORK.

COMMERCIAL PUBLISHING COMPANY,
Plaintiff in Error,

against

SAMUEL C. BECKWITH,
Defendant in Error.

No. 132.
October Term,
1902.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

Statement of Case.

This action was instituted in the New York Supreme Court to recover from the defendant the sum of $3.902.74 for money had and received, the plaintiff recovering judgment accordingly; on appeal being taken to the Appellate Division of that Court the judgment was affirmed, and subsequently reversed by the Court of Appeals, a writ of error at the instance of the plaintiff brings the matter into this Court for review upon the record.

The writ proceeds upon the alleged grounds that the Court of Appeals disregarded the decrees of Courts in Tennessee and that such disregard was in conflict with the constitutional rights of the plaintiff set up by the pleadings.

A motion was duly made to this Court on the Record at the October term, 1901, to dismiss the writ for want of jurisdiction and to affirm the judgment, which motion was postponed by the Court to be heard with the arguments on the merits.

The plaintiff contended in the Trial Court that the money sued for had been collected and retained by the defendant wrongfully and unlawfully, in that the agency agreement between him and the Memphis Appeal Company under which the defendant claims to have acted did not justify such collection and retention.

Record, p. 2, Complaint.

The defendant justified his action as being proper and lawful under that agreement.

Record, p. 6, Answer.

For the purpose of the trial in the lower court, it was duly stipulated that the same should be had upon an agreed statement of facts and such trial was had accordingly.

Record, pp. 11-15 inclusive.

To the said statement of facts copies of certain documents were annexed as Exhibits in verification of such facts, but there was no stipulation that matter found in such Exhibits which raised any questions other than specifically set out in

said statement should be taken as additional facts for submission, or consideration at the trial.

Record, p. 11, fol. 19.

Upon the trial of the action in the Supreme Court upon the facts as so stipulated the exceptions of the plaintiff were sustained and affirmed by the Appellate Division of that Court and thereupon an appeal was taken to the Court of Appeals.

The Court of Appeals reversed the Appellate Division, thereby sustaining the answer to the complaint that the agency agreement gave the defendant a lien upon the accounts in question and the privilege of collecting the same, and appropriating the proceeds towards the liquidation of the balance due on the loan to the company, and that the receiver's interest in such accounts were subordinate to that of the defendant, and that there was nothing on the record showing that the defendant's rights under the agreement had been adjudicated by the Court in Tennessee.

Commercial Pub. Co. vs. Beckwith, 167 N. Y., 329.

POINT I.

No federal question arises upon the construction by the Court of Appeals of the agreement of January 3rd, 1891, as to the rights of the defendant thereunder and the same is not reviewable under the writ herein.

Such construction is a State question, not a Federal question.

On January 3rd, 1891, the defendant and the Memphis Appeal Company, entered into an agency agreement evidenced by paper writings executed by the respective parties under that date, (which are to be read together and constitute one agreement) and this agreement was mutually performed up to about September 20th, 1893, at which date, the company executed and delivered a deed of trust of its newspaper property to Gwynne and Morgan as trustees for the purposes therein mentioned.

Record, p. 11, etc., fols. 20-21.
Record, pp. 16-21 inclusive.

Upon the delivery of this deed the Trustees took possession of the property therein mentioned, and the publication of the newspaper, the Memphis Appeal Avalanche, which theretofore had been published and circulated by said Company, was continued by a receiver appointed *pendente lite*, by the Chancery Court of Tennessee in a suit therein pending to enforce the terms of said deed.

Record, p. 13, fol. 22.

At the time of the execution of the trust deed the defendant had made his loan of $30,000 to the Company under said agreement, and the Company was

then indebted to him in at least the amount of $20,000 as an unpaid balance on account thereof.

Record, p. 13, fol. 22.

The substance of the agreement of January 3rd, 1891, is, that in consideration of a loan by defendant to the Memphis Appeal Company he was appointed sole Eastern Agent for the Company at New York and Chicago, for the purpose of procuring and receiving advertising matter to be forwarded to the Company for publication in said newspaper, with power to make the rates therefor and to make collection for such publication, and to retain from the proceeds at least $1,000 monthly, and apply the same in liquidation of said loan remitting surplus, less his commission to the Company accordingly. Collateral security by way of Company notes and capital stock was to be given to the defendant.

Record, p. 11, etc., fol. 20, etc.

The loan was duly made, the collateral security given (which proved to be worthless) and the defendant entered upon the discharge of his duties as such agent, and on the execution and delivery of the said trust deed, September 20th, 1893, the Company was in possession of unpublished advertising matter which had theretofore been procured and forwarded by defendant to it under said agreement for publication in its said newspaper accordingly.

Record, p. 13, fols. 22-23.

This deed was subsequently declared void by the Supreme Court of Tennessee on appeal.

Record, p. 9, fol. 15, p. 15, fol. 26, p. 37, Sub. 3.

This advertising matter was subsequently published by said Receiver in said newspaper, after due notice to him by the defendant of his rights under the agreement, that if he made such publication, he, the defendant, would collect the accounts for the charges therefor and apply same towards the liquidation of the loan; the defendant collected such accounts and applied same within the limit of $1,000 per month accordingly, which absorbed the entire amount so collected, such collections being the money sued for herein.

Upon these facts the Court of Appeals sustained the defense set up by the answer, that defendant had the right under an agreement with the Company to make the collections in question and apply them upon such loan and had an equitable lien on the accounts and money for such purpose, and that the Receiver having published the accumulated advertising matter furnished the Company under the agreement, after due notice to him by defendant of his rights concerning the same, was deemed to have adopted the agreement to that extent and was bound accordingly.

So far then as the construction of the agreement is concerned and all questions of law and fact arising thereunder which comes within the decision of the Court of Appeals *and do not involve a federal question*, we assume this Court will not review under this Writ, and that as to such construction this Court will consider the same as *res adjudicata*, and that the Court of Appeals having construed the agreement and decided that the defendant had a lien upon all accounts arising under the agreement, and the right to collect and apply same in liquidation of his loan to the Company, and that the Receiver having published matter furnished to the Company by the defendant under the agreement,

after notice to him of defendant's rights concerning same, was bound by its terms, and this Court will not review such construction *unless it finds that the plaintiff had specially set up a federal question by his complaint, involving a construction of the agreement*, and as the record does not show any such a federal question, no such review will be made by this Court.

The practice of this Court on this subject has been long established and has but lately been reiterated by its decision of a case fully covering the one at bar.

> Kennard vs. Nebraska, 186 U. S., Part 2, p. 304.

Standing upon this assumption it would seem to be the established facts and law of the case at bar that under the terms and conditions of the agency agreement of January 3rd, 1891, the defendant had the right to collect the money in dispute in this action and had an equitable lien for such purpose on the accounts in question in the hands of the receiver, and that after such collection he had the right to apply the proceeds towards the liquidation of the balance due him from the Company upon his loan, and that this Court will not review the decision of the Court of Appeals on that subject, for it cannot be said that any federal question was set up by the plaintiff in his complaint which called for the construction of the agreement *based upon any Constitutional rights claimed by him*, the only federal questions, if any, being one as to the effect of certain practice decrees made in the Tennessee Chancery Court relating to proceedings, *in rem*, for winding up an insolvent corporation having a

situs in that State, but having no relation to the defendant's rights under the agreement.

Record, Com., p. 2.
Record, p. 51, fol. 91, etc.
Record, Ans., p. 6.
Commercial Pub. Co. vs. Beckwith, 167 N. Y., 329.

Assuming that we are correct in the proposition that this Court will not review any question of fact or conclusion of law found by the Court of Appeals in its said construction of the agreement, we may pass to a consideration of the questions found on the face of the three Assignments of Error upon which this writ is based, and unless it appears by the record that there be a federal question raised for said construction, by the pleadings, as this Court may deem sufficient to invalidate the decision of the Court of Appeals, the decision of that Court as to the rights of the defendant under the agreement will stand as *res adjudicata*, and will not be the subject of review by this Court, or in other words, *the question before this Court is not to determine the rights of defendant or the receiver* under the agreement (the same having been determined by the Court of Appeals) *but to determine the effect of the sales decrees as to such rights.*

If, however, we are in error as to this conclusion, and this Court deems it a duty to review the judgment of the Court of Appeals as to such construction, we most respectfully submit the following to the consideration of the Court in support thereof:

(*a*) The defendant's rights under the agreement embraced a lien upon all accounts accruing for the publication of mat-

ter furnished by defendant thereunder, and his right to collect the same and apply the proceeds to the purposes stated in the agreement

(*b*) *The agreement was entire and indivisible* and the Receiver must be deemed to have adopted the same when he published the matter furnished by the defendant, after he had received notice of his claimed rights thereunder; he could not enjoy the benefits arising under the agreement and not share the burdens and obligations attaching thereto.

(*c*) The trust deed being void, and so decreed by the Supreme Court of Tennessee, the trustees nor the receiver had any title to the property therein mentioned, or to the accounts sold under the decree of sale, the same being the property of the Company by reason of its void trust deed, and therefore subject to the conditions of the agency agreement.

Pomeroy's Eq. Jur., Sec. 1237.
Overton's Liens, 1, 30, 266.
High's Receivers, 2nd Ed., §5, 440, etc.
Ming vs. Corbin, 142 N. Y., 340 opinion.
Pierson vs. Crooks, 115 N. Y., 554 opinion.
Ames vs. U. P. Ry., 60 Fed. Rep., 966.
Kneeland vs. Am. Loan Co., 136 U. S., 97.
Commercial vs. Beckwith, 167 N. Y., 329.

On the other hand the plaintiff rested his contention in the Trial Court and before the Appellate Courts of New York, that the defendant had no lien under the agency agreement and hence had no right to make the complained of collections *upon the case of So. Ex. Co. vs. Ry. Co.*, 99 *U. S.*, 151, *and other cases following the same.*

The defendant's counsel argued before the Court of Appeals, and is still of the same opinion, that the cases cited by plaintiff are not applicable to the one at bar, and the Court of Appeals in its opinion in this case so held.

Upon a consideration of the Express Company case which would be substantially a consideration of the others cited, it appears that case turned upon the construction of a contract providing for the mere crediting of certain amounts towards the liquidation of an indebtedness arising under the continued operation of the contract, and did not provide directly or indirectly for the collection or retention by either party of any property or money belonging to the other for the purpose of such crediting or liquidation, nor did the contract undertake to establish a lien for any purpose and the case was distinguished by the Court of Appeals from the one at bar accordingly.

Commercial Publishing Co. vs. Beckwith,
167 N. Y., 336, opinion.

POINT II.

The defendant's right to collect and devote the money in question to the purposes of the agreement was not affected by the decree of sale in the Tennessee Courts or the sale made thereunder.

The plaintiff in error to maintain the writ herein contends by three assignments of error, that the Court of Appeals acted in violation of the United States Constitutional rights of the plaintiff whose vendor was a purchaser at a judicial sale in Ten-

nessee under a decree of Courts therein made in an action to which he claims defendant was a party for the following reasons as generally summarized:

First. By deciding that the decrees of the Circuit Court of the United States for Western District of Tennessee directing and confirming certain sales were not binding upon the defendant, and that Crawford, the plaintiff's vendor, as the purchaser at the sale did not acquire a good title to the claims purchased, and that thereby was drawn in question in the New York State Courts a title claimed by plaintiff in error, under an authority exercised by the United States, and that such decision was against the title specifically set up and claimed by said plaintiff under said authority.

Record, p. 51, Subd. 1.

Second. By deciding that the decrees of the Chancery Court of the State of Tennessee directing and confirming certain sales were not binding upon the defendant herein, and that Crawford, the purchaser at the sale did not acquire a good title to the claims sold under said decree, and that thereby was drawn in question in the New York State Courts a title, right, privilege or immunity claimed by the plaintiff in error, in and by the United States Constitution and laws and that such decision was against the same as specifically set up or claimed by the plaintiff and that the said New York Courts in so deciding refused to give the records and proceedings of the Courts of the State of Tennessee due faith and credit, and thereby denied the United States Constitutional rights conferred on plaintiff in that regard.

Record, p. 52, Subd. 11.

Third. By deciding that Crawford, a purchaser

under a judicial sale in the State of Tennessee, did not acquire thereunder as against the defendant any title to the accounts in question herein, for that said defendant and William J. Chase, the Receiver, were both parties to the proceedings in the Tennessee Courts, and that such Courts having jurisdiction of these two parties decreed that such purchaser should have a title to the property purchased at the sale free and clear of all liens, claims and incumbrances, and that said defendant was bound by said decree as being such a party, and by reason of the New York Courts so deciding, there was drawn into question a Constitutional privilege claimed by plaintiff and that such decision was against the title, privilege, right or immunity specifically set up by the plaintiff in error of his right under the Constitution and laws of the United States.

Record, p. 52, Subd. 11.

In the consideration of the three assignments of error, the defendant in error, proceeding upon the basis that the construction of the agreement of January 3rd, 1891, by the Court of Appeals is *res adjudicata*, involves no federal question, and will not be reviewed by this Court under this writ, enters into a consideration of such assignments in their order respectively.

As to the First Assignment of Error:

The plaintiff contends that the decree of sale alleged to have been entered in the United States Circuit Court in Tennessee and the sale thereunder and its subsequent confirmation by that Court, operated to insure a good and valid title in the purchaser to the claims for advertising involved in this suit and bound the defendant in error accordingly, because he was a party to the suit in

which said decree was made, and that he was accordingly cut off and deprived of his rights and privileges under the agreement of January 3rd, 1891, regarding such accounts.

The first assignment of error proceeds upon the theory that the decree of sale of the property of an insolvent corporation had been made in the United States Circuit Court in and for the Western District of Tennessee in the trust deed suit in that Court, after the removal thereto of defendant's in error separable controversy from a suit pending in the Chancery Court of that State, that the defendant is bound by such decree for the sole reason that he was a party to the action so removed to the United States Circuit Court.

Record, p. 51-52, fol. 91.

In reply to this theory the defendant contends that it does not appear by the record that such a decree was entered in the United States Circuit Court suit to which he was a party, or that he had notice of application for such a decree.

This Court on examining the record will find that a suit was instituted by Gwynne and another as Trustees of a trust deed to them from the Memphis Appeal Company in the Chancery Court of Tennessee, and that defendant was a party in some way to said suit, and that such suit was to enforce the provisions of said deed and for no other purpose; *that the defendant in error thereupon caused to be removed such separable controversy therein* as he might have, to the United States Circuit Court on the ground of his non-residence in that State, *and that the Chancery Court thereupon lost jurisdiction of defendant and such controversy*, and that no proceedings were had in the said United States Circuit Court suit subsequent to such removal; that the original trust deed suit remaining

in the Chancery Court was consolidated by its decree with three creditor suits pending in that Court against the Memphis Appeal Company, and that such consolidation proceedings did not and could not apply to the trust deed suit *as removed to the Federal Court* by the defendant in error; that no decree as alleged to have been entered in the United States Circuit Court is set forth, and no notice of such entry or application for such decree was given to the defendant in that suit as so removed or otherwise, or that he had due notice of such entry; and no order of consolidation of such suit with any other suit was made or entered in the United States Circuit Court in the trust deed suit as so removed thereto, and for such reasons it would seem that if such a decree was made and entered the defendant was not bound thereby.

Record, p. 14, Sec. 12.

Again.

If such a decree was entered in the United States Circuit Court in a suit in which the defendant in error was a party, that fact alone does not make the decree binding upon him, he not having received due notice of application therefor, or had an opportunity to be heard thereon, no such notice appearing by the record, nor does it appear by the record that any such decree was entered in the suit so removed to the United States Circuit Court and while it is true that as appears by the record, that "similar decrees were entered in the United States Circuit Court," it *does not appear that such entry was in any case or proceeding in the United States Circuit Court to which the defendant was a party.*

Record, p. 14, fol. 25.

There is nothing on the record showing that the United States Circuit Court had jurisdiction of the

subject matter of the said decree of sale alleged to have been entered therein, and it does not appear that the creditor suits pending in the Chancery Court had been removed from that Court to the United States Circuit Court by any proceeding whatever, or that the said United States Circuit Court had any jurisdiction or authority to allow the entry in its office of a decree of sale similar to the one entered in the Chancery Court, and this Court will take judicial cognizance that *there is no practice in its subordinate Courts which will permit the entry of a decree such as is contended by plaintiff, was entered in the United States Circuit Court for the Western District of Tennessee.*

Record, p. 14, Sec. 25.

This Court will see by the record, that the consolidation of causes in the State Chancery Court was made in that Court and applied only to the causes therein, and did not, and could not, apply to or affect the seperable controversy of the defendant in error as removed to the Federal Court as aforesaid, *for it was to be relieved from the control of the State Court that the removal was had*, and that the record does not disclose the entry of any order for the consolidation of causes in the United States Circuit Court, or that any similar order to the consolidation order of the State Court was ever filed or entered in the United States Court.

Record, p. 14, Sec. 25.

The defendant in error therefore contends that the first assignment of error cannot be sustained for the following reasons:

1st. That no decree of sale or confirmation thereof was entered in the suit pending

in the United States Circuit Court to which defendant was a party.

2nd. That if such an order was entered in that suit or Court it was without notice to or knowledge of defendant in error, and therefore not binding upon him.

3rd. That the United States Circuit Court had no jurisdiction of the creditor suits, the parties thereto, or the subject matter involved therein.

4th. That the record does not show that the alleged "similar decrees of sale entered in the United States Circuit Court," were entered in the action pending therein to which defendant was a party; there may have been "similar decrees entered in the United States Circuit Court," but if they were entered in the suit removed as to defendant's controversy in that Court, the plaintiff in error should have had such decrees set out by the record.

5th. That the record does not show that the issues in the trust deed suit as removed by the defendant to the United States Circuit Court included the winding up of the Memphis Appeal Company *as an insolvent corporation*, and the sale of all of its corporate property, as would have been necessary to warrant a decree of sale of the character alleged to have been entered in that Court.

6th. That the record does not show the proper jurisdictional facts and conditions upon which to base the alleged entry of the

said alleged "similar decrees" in the United States Circuit Court for the Western District of Tennessee.

AS TO THE SECOND ASSIGNMENT OF ERROR:

The second assignment of error proceeds upon the theory that the defendant in error was bound by the decree of sale and confirmation made in the Chancery Court of Tennessee in the so-called consolidated action pending therein, for the reason that said defendant is alleged to have been a party to such consolidated action.

Record, p. 52.

By the record it appears that on the 5th day of October, 1893, there was pending in the Chancery Court of Tennessee an action by the trustees of a trust deed against the Memphis Appeal Company to enforce the terms thereof, to which action the Defendant in Error was made a party, but to what end or for what purpose the record does not disclose, the bill of complaint in the suit not being in the record, and that in this action Wm. J. Chase had been appointed a Receiver of the trust property covered by the deed, and it does not appear by the record that the defendant in error had any interest in said property or the object or result of the suit, and from a reading of the deed it would appear he had no interest thereunder or in the suit to enforce the same.

On or about October 5th, 1893, the defendant, being a non-resident of Tennessee, caused such controversy as he might have, if any, in the trust deed suit, to be removed therefrom to the United States Circuit Court for the Western District of Tennessee, and thereafter the said two Courts exercised concurrent jurisdiction of the trust deed action, that is to say, each Court exercised such juris-

diction concerning the action as being and remaining in them respectively, under the laws and practice pertaining thereto, the United States Circuit Court under the laws and practice of the United States as to Federal Courts, the Chancery Court under the laws and practice of Tennessee as to State Courts.

Record, p. 14, Sec. 10.

Subsequently three proceedings in the nature of creditors actions, *in rem*, were instituted in said Chancery Court by creditors of the Memphis Appeal Company, other than of those named in the trust deed, to wind up that corporation as an insolvent, but the record does not show that the Defendant in Error was a party to any of these suits or bound by the proceedings therein, he being a non-resident of that State, except so far as proceedings, *in rem*, would be binding upon such a non-resident.

On January 19th, 1894, the trust deed suit as remaining in the Chancery Court (after the removal of defendant's separable controversy to the United States Circuit Court) and the said three creditor suits were consolidated in the Chancery Court by its order of that date, *such order being entered ex parte, on the consent of the respective complainants therein only*, and the record does not show that any notice of application for such order was given to defendant in error or that he had opportunity of being heard in opposition thereto.

Record, p. 26, Sec. 4.

The record does not show that the defendant in error was ever within the jurisdiction of the Chancery Court of Tennessee *after the removal of his separable controversy to the Federal Court*, or

that he ever took any part in the proceedings in said Chancery Court actions as consolidated, or otherwise, but the plaintiff's counsel endeavors to mystify or mislead the Court as to the defendant's position in said consolidated action, by referring to matters extraneous to the facts stipulated for the trial, found in verifying Exhibits (Record, p. 31, fols. 54, 55 and 61) concerning litigation in no way material or pertinent to the case at bar, namely, that on or about March 26th, 1896, an action was or had been pending in the Chancery Court of Tennessee in which Foley-Williams Company was plaintiff and the Memphis Appeal Company was defendant (*said action not being one of those included in the consolidation order*) ,and that the defendant in error had filed a cross-bill in the Foley-Williams action, *for some purpose not appearing by the record*, and that the same was dismissed (Record, p. 31, fol. 54) for the stated reason that he had no lien upon "the fund in Court" (*presumably arising in the Foley-Williams' litigation*) for the payment of a judgment held by him against the Appeal Company (Record, p. 36, fol. 61), and although the disposition of defendant's bill is recited in a decree entered in the consolidated action, *it is not apparent why reference thereto should be made in that decree*, and it is clear that the sale of the Memphis Appeal Company's property under the decrees mentioned in this assignment of error was not a factor in the controversy in the Foley-Williams' proceeding, but on the contrary it appears that the defendant might have been a party to the Foley-Williams' Company action, *which was not included in such consolidation*, and that he had obtained a judgment of some kind against the Appeal Company which he sought to satisfy out of some fund in Court *arising out of that litigation*

as distinguished from that of the trust deed and the consolidated actions, but the nature of either the judgment or fund does not appear by the record, and so far as such fund is concerned *it is very clear that it was not one arising from the collection of the disputed accounts,* the subject of the present litigation, for it is manifest beyond all controversy, that the proceeds of such collections were never in the hands of the Receiver or constituted a "fund in Court" upon which an execution could have been levied in Tennessee, *for such proceeds were always in the hands of the defendant at New York, and never in the hands of the Receiver or a fund in the Court of Tennessee.*

Record, p. 3, Sec. IX-X, complaint.
Record, p. 14, Sec. 9, Facts.

This matter although contained in one of the Exhibits annexed to the stipulated facts, *was not one of such stipulated facts,* and so far as any question arising in the suit at bar is concerned, *must be considered as entirely extraneous to the questions before this Court,* for if the defendant was a party to the Foley-Williams Company suit against the Appeal Company it does not follow that he was a party to the consolidated action, of which the Foley-Williams suit *did not form a part.*

Stipulated Facts, Record, p. 11, fol. 19, etc.

The contents of Exhibits in verification of stipulated facts *do not add to such facts others not stated as such in the stipulation,* and can only be considered as supporting such stipulated facts to the extent applicable thereto, hence Exhibit 7, which is the only source of information as to the Foley-Williams' episode, and which was annexed to the stipulation *to verify only the facts of the Receiver's*

official actions and the final termination of the consolidated action, can be referred to only in connection with those facts and none other.

It is therefore the contention of the defendant that he was not a party to the consolidation action in the Chancery Court and that such Court lost jurisdiction of him and any controversy he might have had in the trust deed suit remaining in that Court upon its removal to the United States Circuit Court, *for the sole purpose of the Statute under which such removal was had, was to divest the State Court of such jurisdiction*, and it will be noticed by this Court that there is no stipulated fact that defendant was a party to the consolidation, and it will take judicial cognizance of the practice at its bar, *that no person can be made a party to an action by its consolidation with another, to which he is not a party, except upon the consent of all interested or by order of Court upon due cause shown.*

This assignment of error being upon the stated ground that the defendant was a party to the consolidated action in the Chancery Court and therefore bound by its decrees therein, must fall, as it does not appear by the record that he was such a party.

As to the Third Assignment of Error:

This third assignment of error proceeds upon the theory of the plaintiff in error that the defendant is bound by the decree of sale of some Court in Tennessee, *not specified in the assignment*, because as he alleges the defendant and Wm. J. Chase as Receiver in the trust deed suit as remaining in the Chancery Court, were parties to the action in which the said decree was made, and because such decree guarantees to the purchaser at the sale a title free from all claims, liens, etc.

It is not clear *which Court in Tennessee* the plaintiff refers to in this assignment as making the decrees, but as the record shows that the Chancery Court is the only one making such decrees, and as the Receiver was appointed in a suit in that Court, we assume that *it is the Chancery Court which is so referred to by plaintiff*, if however it is claimed by him that both the United States Circuit Court and Chancery Court are intended in such reference the answer is that the record does not show any sale decrees or confirmation thereof made by the United States Circuit Court *in a suit therein to which the defendant was a party*, or that there was any such action pending in that Court in which such a decree could be made, nor does it show that a Receiver was ever appointed in such United States Circuit Court action, or was a party thereto, nor does it show that any proceedings were ever had in that suit as removed to the Federal Court subsequent to such removal.

The Receiver was appointed by the Chancery Court, and it is clear that on the removal of the defendant's controversy to the United States Circuit Court, his official capacity continued with the Chancery Court action as left in that Court *and did not attach* to the suit as removed to the United States Ciruit Court, nor was he ever a party to either or any of the litigation set out by the record, but was merely an appointee of the Court and not a party, as such, to the suit in which he exercised his functions as such appointee.

As the record does not show that Chase was a Receiver in the suit as removed to the United States Circuit Court or a party thereto, the plaintiff must be mistaken in contending that the defendant and Receiver were parties to that suit, and if, on the other hand, he intends to be understood

that the defendant and Receiver were parties to the Chancery Court action, *his theory is defective, for that Court lost jurisdiction of defendant by reason of the removal order to the Federal Court,* and therefrom the defendant ceased to be a party to the State Court suit, consequently was not a party therein at the time of the making of the sale decrees by that Court, and hence it is clear that the first ground for the third assignment of error must fail.

As to the second ground for such third assignment of error, that the decrees guaranteed to the purchaser at the sale a good title to property purchased thereat free from all liens, etc., it is to be said, that such *a guarantee is no more binding upon the defendant than any other provision of the decree, unless he was bound by the decree as a whole, and that condition does not prevail in this case,* but the plaintiff contends that the *ipse dixit* of the Chancellor as voiced in the language of the decrees was potent to vitalize such an assumption of power, and that accordingly such guarantee cut off all defense to a claim purchased under the sale; while we are quite willing to accord to the learned counsel for the plaintiff in error the possession of high legal acquirements and much erudition, *we are not prepared to concede his contention that such a decree could be enforced against a secured creditor in the absence of evidence that the same was made upon due notice to a holder of a lien or an opportunity for him to protect his rights likely to be jeopardized by such a decree.*

In the case at bar the record is absolutely silent as to any evidence that the rights and privileges of the defendant in error arising under the agreement of January 3rd, 1891, or as involved by the decree containing such guarantee had ever been the subject of controversy or litigation in the Court in

which the decrees containing such guarantees were made, or that such agreement had been construed or been before any Court in any way, manner or form, in litigation in the Courts of Tennessee, and that being the case it seems incredible to us that a lawyer of such eminent standing in his profession as is the learned counsel for the plaintiff in error, should contend that the defendant could be thus summarily, arbitrarily and unjustly cut off and deprived of the assertion of his claims under that agreement.

While it is true that the record shows that the defendant and the receiver had a controversy regarding the performance of work imposed upon the Company by the agreement, *such controversy was no part of the proceedings then pending in the Chancery Court* action, and the record does not show that it or the subject matter of said controversy was included or involved in any issue arising in the trust deed suit, which was the only suit in which the defendant was a party, for the deed on its face does not support such a theory, *nor is the bill of complaint in the trust deed suit set up by the record.*

There is nothing in the record from beginning to end showing that any claim, right, or privilege in behalf of the defendant under the agreement of January 3rd, 1891, or that such agreement itself, ever played any part in litigation in the Tennessee Court or that the defendant's rights and claims to the moneys represented by the accounts in question, had ever been the subject of consideration in such Courts or been construed by any judicial tribunal therein, and as a consequence the guarantee of title in the decree did not cut off the right of claim to any property sold thereunder which the defendant had under such agreement.

But the plaintiff contends that the purchaser at

the sale was justified and protected in his purchase under the decree containing the said guarantee, because of its mere existence and presence on the face of the decree and having acted in good faith and dependency upon the statements and promises contained in the decree, and cites cases decided in both the United States and local State Court of Tennessee, but neither of these cases support such a proposition, for *it will be found on their examination that in each case, the rights and contentions of the parties making claims to the property sold at the judicial sale, had been considered and adjudicated in the litigation in which the decree was made for the sale of the property claimed*, such not being the condition in the case at bar, and it may be said that such cases really support the contentions of the defendant, that the guarantee in the decree of sale in the case at bar was not binding upon the defendant, for the reason that his rights under the agreement had not been considered and adjudicated in the proceeding in which the decrees were alleged to have been made and the sale had.

But the plaintiff in raising the question of "good faith," must also accord to the defendant the "good faith" attaching to liens, for if this attribute and quality of a lien, be lightly regarded, the stability of such a security would be precarious, indeed.

Again.

The plaintiff claims that if the rights of the defendant under the agreement of January 3rd, 1891, had not been actually considered and adjudicated in the Tennessee litigation, that they could have been so considered and adjudicated, but *that proposition is untenable, for this Court will not consider or review "that which might have been done" but only such matters as were actually adjudicated in the Tennessee litigation.*

The principle contained in this contention of defendant has been fully considered and adjudicated in this Court in a well considered case the ruling in which has never been questioned or modified by this Court.

Ray vs. Norseworthy, 23 Wall., 128.

> *"Notice in some form must be given in all "cases, else the judgment or decree will not "conclude a party whose right of property "would be divested by the proceeding.*
>
> *"No man is to be condemned without the "opportunity of making a defense or to have "his property taken from him by a judicial "sentence with out the privilege of showing, "if he can, that the pretext for so doing is un- "founded."*
>
> *Ray vs. Norseworthy*, 23 *Wall.*, 128 *opinion.*

On a comparison of that case with the one at bar, it will be found that each were proceedings to wind up the affairs of an insolvent and to sell its property.

Each Court had jurisdiction to order a sale of such property free and clear of liens and encumbrances; each Court ordered a sale without requiring notice of the application for such a decree to be given to the secured creditors.

The case at bar falls within the scope of the Ray case and must be governed by the law thereof accordingly, and it follows that under the rule in that case, the provisions in the decree of sale by the Tennessee Court that the purchaser of the property of the Appeal Company and the accounts due and to become due the receiver, would acquire title thereunder free and clear of all liens, claims

and encumbrances, *was not binding upon the defendant, he not having received notice of application for a decree containing such provisions, or had an opportunity to show, if he could, that he should not be deprived of property claimed by him or his lien thereon under the agency agreement.*

Ray vs. Norseworthy, *supra.*

POINT III.

The Court of Appeals did not act in conflict with the decrees made by the Courts in Tennessee.

The record does not show that the Court of Appeals acted in conflict with the sale decree of the Chancery Court in Tennessee or any other Court therein and so far as the action of the New York Court is concerned, except as shown on the face of its remittitur, the pleadings and stipulated facts, recourse must be had to the officially published report of the case (Commercial vs. Beckwith, 167 N. Y., 329) by which it appears that the only decision therein by that Court *was a reversal of Plaintiff's Judgment*, the grounds of the decision being that the moneys due for the accounts sold to Crawford under the sale decree of the Tennessee Court, to the extent of $1,000 monthly belonged to the defendant and any excess thereof to the receiver, *that there being no excess*, the receiver had no interest for the purchaser to acquire in the accounts so sold, and that the Tennessee Courts had not adjudicated the rights of the defendant under the agreement.

Neither the decree of sale or the sale thereunder were attacked or construed by the record before the Court of Appeals, and no disregard of the same

can be inferred from its reversal of the Supreme Court judgment, on the contrary, it must be said that had the Court of Appeals been of the opinion that the money in question belonged to the receiver, it would have held that the decree of sale protected the alleged title in the purchaser of the accounts representing the same.

The test, therefore, in this matter is now and ever has been, *did the money represented by the said accounts belong to the defendant or to the receiver*, and this test is not one to be decided by the language contained in a decree of sale made to apply generally to property belonging to an insolvent corporation or the receiver, it must be decided by a construction of the agreement itself, and as no construction thereof had been made by the Tennessee Courts, said construction was made by the Court of Appeals and is *res adjudicata*, and not in conflict with the language of such decree.

> Commercial Pub. Co. vs. Beckwith, 167 N. Y., 329.

The language of the decree cannot be injected into the construction of a contract, to alter or affect a written agreement evidencing the same unless the agreement itself was made the basis for such language by reason of a prior adjudication upon the same in the litigation out of which the decree arose.

The agreement not having been construed or defendant's rights under it adjudicated by the Tennessee Courts it cannot be properly contended that the Court of Appeals in its action construing the same was under any obligation to consider the decree as being before it in connection with such construction.

The construction of the agreement was the first consideration by the Court of Appeals, the lan-

guage of the decree of sale being extraneous matter to the agreement was not necessary or proper as a factor in such construction, and the rights of the defendant under the same being *res adjudicata*, and the decision of no federal question being necessary thereto, this Court will not interfere with or review the same under this writ.

Again

> *The accounts in question were sold subject to defendant's rights, equities and liens therein and thereto.*

The record shows that the sale as ordered by the Chancery Court and actually made under the decree was of all the property of the Memphis Appeal Company in general as an insolvent concern, and also all the trust property in the hands of Receiver Chase, *together with all the accounts that were due or to become due to him by reason of his conduct of the insolvent's newspaper*, but the accounts were not due nor could they become due to such Receiver (being subject to lien, claims and rights of deefndant under the agreement) until defendant had been satisfied of his claim therein, and until then no portion thereof could be regarded due or to become due or constitute any property in the Receiver's hands *or pass under the decree of sale.*

For the consideration of this point it may be sufficient to stand on the record itself, that is to say, it was not one of the stipulated facts before the New York Trial Court, that an absolute ownership by the Receiver of the accounts themselves appearing in Schedule B, Record, p. 5, were sold under the sales decree, *but only the Receiver's right, title and interest therein*, irrespective of what such interests might be, that were so sold (Record, p. 15, Sec. 13), but in addition to such fact, it is clear that no title can be given on a sale unless the property sold is owned by the seller who would thereby

be divested of such ownership, and as the Court of Appeals has adjudicated that the defendant is the owner of the sums due on the accounts sold under the decree (the Tennessee Courts not having adjudicated on that subject) the purchaser at the sale obtained no title thereto as against defendant's lien or claim under the agreement of January 3rd, 1891.

It therefore follows that so far as the Receiver is concerned the sale of the accounts in question was confined to his right, title and interest therein, and that the purchaser took such accounts or the paper writings representing the same, subject to all defenses, claims and liens of the defendant, and in the absence of notice of application for the decrees to defendant neither the language of the sale decrees or the fact of sale thereunder could dominate the action of the Court of Appeals which is made the basis of the writ now before this Court.

But the plaintiff insists that the accounts themselves and not only such right, title and interest were sold under the decree; this proposition may be conceded only on the theory that the accounts themselves were not the property of the Receiver but were the property of the company itself, by reason of the decree of the Appellate Court of Tennessee that the trust deed was void on its face, and if the company owned the accounts they were subject to the lien and claim of defendant under the agreement.

Record 9, fol. 15; Record 15, fol. 26; Record 37, Sec. 3.

POINT IV.

The rule in Murdoch vs. Memphis, 20 Wall., 634 governs the case at bar.

"1. It is essential to the jurisdiction of this "Court over the judgment of a State Court "that it appear that one of the questions men- "tioned in the act (Sec. 709, U. S. Rev. Sts.) "has been raised and presented to the State "Court.

"2. It must have been decided by the State "Court or that its decision was necessary to the "judgment rendered in the case.

"3. That the decision was against the right "claimed by plaintiff in error under the "Constitution, etc.

"4. These things appearing, the United "States Supreme Court has jurisdiction and "must examine the judgment so far as to ena- "ble it to decide whether the claim of right "was correctly adjudicated by the State Court.

"5. If it finds that it was rightly decided "the judgment must be affirmed.

"6. If it was erroneously decided against "the plaintiff in error this Court must furth- "er inquire whether there are any other mat- "ters adjudged by the State Court which "is sufficiently broad to maintain the judg- "ment of that Court notwithstanding the error "in deciding the federal question, and if this "is found to be the case the judgment must be "affirmed without regard to the soundness of "the decision on such other matter or issue.

"7. If it is found that the federal question is "of such controlling character that a correct "decision is necessary to any federal question "in the case, or that there has been no decision

"of State Court of any matter sufficient to sus-
"tain the judgment without regard to the fed-
"eral question, this Court will reverse the
"State Court, and will render such judgment
"as the State Court should have done, or re-
"mand the case," etc.

In the consideration of this rule which must govern the disposition of the writ by this Court, it is the contention of the defendant,

1st. That none of the questions required by the federal statute were raised and presented by the plaintiff to the State Court.

It is not sufficient to embody in a pleading matter which being subjected to microscopic examination may be said to embody some such question, but such matters must be clearly stated as being that upon which the pleader *relies for the relief asked for in the pleading*, and particularly so where such matter is accompanied by other matter upon which it is equally apparent that such asked for relief is based.

The matters in the complaint which the plaintiff in error now claims to have presented to the State Court as raising an alleged federal question is only to be found by reading the entire papers and *when found is substantially a recitation merely of an incident in litigation some time pending in the Courts of Tennessee*, and is part of the history of proceedings therein, extraneous to the rights of defendant under the agency agreement, and is not set up as a federal question upon which this Court is to understand the plaintiff relied for his recovery in the action, for it is nowhere found in that proceeding that plaintiff based his claim of title upon the effect of *the guarantee* found in the decree of sale, and it is apparent that he equally claimed title for the al-

leged reason that the receiver *owned the accounts* (sold to Crawford) *by virtue of his office* and that it was such ownership which was sold under the decree, and the only point upon which the plaintiff rested his contention before the Court of Appeals, as appears from the officially published report of the case, *was that the defendant had no lien upon the accounts in the hands of the receiver, and that the receiver's title was a sufficient one in the purchaser at the sale.*

> Commercial Pub. Co. vs. Beckwith, 167 N. Y., 331, Plffs. Points.

2nd. The record does not show that the Court of Appeals decided any federal question, or that a decision thereof was necessary to the judgment rendered in the case.

The decision of the Court was a construction of the agency agreement, the defendant's rights thereunder, and the ownership of the money due or to become due on the accounts in the hands of the receiver by reason of his operation of the business of the insolvent corporation, the other party to said agreement. The decision of a federal question, if any, presented by the pleadings was not necessary to the judgment ordered by the Court of Appeals, for such judgment was based upon facts independent of those upon which the federal question alleged to have been presented by the pleadings could be founded.

3rd. The decision of the Court of Appeals was not against any right claimed by plaintiff in error as arising under the Constitution of the United States, no such question having been clearly and plainly set up in his complaint in such a way as to lead the Court or the

defendant to know that he intended to rely thereon to the exclusion or in the place of other matter set up in the pleadings.

4th. None of the things mentioned in the 1st, 2nd, and 3rd sections of the rule referred to appearing by the record, this Court is not called upon to examine the judgment of the State Court from which this writ is taken.

5th. If on the other hand this Court finds by the record that a federal question necessary to the judgment was rightly decided by the State Court, or that no federal question presented for its decision was decided by it, this Court will affirm the judgment.

It is the defendant's contention that no federal question necessary to the judgment was disregarded by the Court of Appeals, but if such an one was presented to and decided by that Court it was properly decided, and would not effect the operation of the decree of sale containing the guarantee of title to purchasers free and clear from all liens, as such guarantee did not cut off the defendant's lien, he having had no notice of the application for the decree containing the same.

6th. If such a federal question was erroneously decided by the State Court of Appeals, this Court will further examine whether there was any other matter adjudged by that Court which is sufficient to sustain its judgment irrespective of error in the decision of such federal question, and if such matter appears the judgment will be affirmed without regard to the correctness of the decision of the federal question.

In the case at bar if a substantial and material federal question was clearly presented by the pleadings and erroneously decided by the Court of Appeals, *it was not necessary to the proper judgment in the case, for such judgment was based upon the generic and vested rights of defendant under the agency agreement, which had never been cut off or abridged by any adjudication thereon in a foreign Court, or by the decree of sale,* as such rights were those of ownership, and as such ownership was found by the Court of Appeals to be in the defendant and not in the insolvent or the receiver, no provision of the decree was violated, nor was any decision construing the legality or the effect of such decree necessary to be made by that Court for the purpose of the judgment ordered by it.

7th. If the reverse condition to those mentioned in the preceding sections of the rule prevails, the writ must be sustained, unless it appears that a correct decision of a substantial and material federal question, clearly and fairly presented by the pleadings, would be necessary to the judgment complained of, but as the case at bar is not one in which such "reverse conditions" appear, there does not seem to be any sufficient ground presented by the record for sustaining the writ.

It therefore follows that where the Court takes such a view of the case within the scope of the pleadings, that a decision of a federal question presented therein would not be necessary, its judgment in general will not be reviewed by this Court, and in such a case there would be no material disregard of such federal question. That there was no necessity for a decision of a federal question in

the case at bar is quite plain for the reason that the only material question presented to the Court of Appeals was, whether the defendant or the receiver was entitled to the money in question under a legal construction of the agreement, and the acts of the receiver in his publication of the advertising matter after notice of defendant's claims under the agreement, and for a decision of this question *it was only necessary to look to the agreement itself, and the stipulated facts as to such publication*, neither the language of the decree of sale or the fact of sale thereunder playing any part in the consideration of that question.

Chapman vs. Goodnow, 123 U. S., 540.
Avery vs. Popper, 179 U. S., 305.

POINT V.

The cases cited by the plaintiff in error to sustain his three assignments of error are inapplicable thereto.

The Court will find on examination of each of the cases cited by plaintiff in support of his assignments of error that the rights of the complaining parties in such cases had been directly or sufficiently litigated or adjudicated in the proceedings in which the complained of action of the Court was had, *and that such parties took such personal part in the proceedings that they were bound thereby.*

In the case at bar the defendant's rights had not been adjudicated in the Courts in which the decrees of sale were made, nor was he a party to such decree, nor did he receive any notice of applica-

tion therefor or have any opportunity to oppose the same.

Conclusions.

First. No federal question based upon Constitutional rights, upon which the plaintiff intended to rely for a recovery in this action, appears clearly and plainly by the record as having been set up by the pleadings.

Second. The defendant had a lien under the agency agreement upon all accounts arising by reason of the direct or indirect operation of that agreement both as between himself and the company and the receiver acting within the scope thereof.

Third. As between the defendant and the company, the agreement was entire and indivisible, and the same rule applied as to the receiver, who was but one *pendente lite*, and although he might not have been compelled to carry out the agreement, he must be deemed to have adopted it, when he published the advertising matter accumulated in the company's hands under it, with full notice to him by the defendant of his claims thereunder.

The receiver could not enjoy the benefits coming out of the agreement without sharing its obligations, principal of which was defendant's right and lien for the collection of the accounts in question.

Fourth. The receiver could not change the relation of principal and agent existing between the defendant and his patrons under the agreement, whose orders obtained by defendant were unexecuted by the Company at the

time of the appointment of the receiver by treating such patrons as his own on the books of the business as conducted by him, without consent of defendant.

Fifth. If the receiver desired to cut off the defendant from his rights under the agreement, he should have instituted some proceedings in the Tennessee Courts to that end, as such a burden did not rest upon defendant, but upon the receiver.

Sixth. The sale decree covered the accounts due and to become due the receiver, and although the accounts in question were claimed by receiver to be due to him, they were subject to the claim or lien of the defendant under the agreement and it was only the receiver's right, title and interest therein which was due and owing to him and sold under the decree, such interest being the surplus that might remain after the satisfaction of defendant's claim of $1,000 per month and commissions, pursuant to the agreement; there being no surplus, the purchaser took nothing but a naked interest.

Seventh. There is no federal question involved as to the rights of the defendant, the Company, or the receiver, arising under the agency agreement, *per se*.

Eighth. If there be any federal question presented by the pleadings it arises only upon the face of the decree of sale made in the Chancery Court of Tennessee and the sale thereunder.

Ninth. No federal question is set up by the pleadings, the decision of which by the New York Courts was necessary to a proper judgment entered therein.

Tenth. If there be a federal question set up by the pleadings a decision thereon was not necessary by reason of the View the New York Court of Appeals took of the rest of the case within the scope of the pleadings, and such view being correct, no disregard of the federal question can be considered as having been made by that Court.

Eleventh. The decision of the Court of Appeals construing the agency agreement and the rights of the defendant and the receiver thereunder, is *res adjudicata* and not reviewable by this Court.

Twelfth. No adjudication of defendant's rights under the agency agreement was made by the Tennessee Courts.

Thirteenth. The defendant was not a party to the actions as consolidated in the Chancery Court of Tennessee, *but had he been a party thereto, he would have been entitled to notice of application for the decree of sale.*

Fourteenth. The Chancery Court lost jurisdiction of the defendant and such controversy as he might have had in the trust deed suit, upon its removel to the Circuit Court of the United States.

Fifteenth. The case as removed to the United States Circuit Court was not included in the consolidation proceedings in the Chancery Court, and could not have been so included.

Sixteenth. The receiver was not a party to the suit so removed to the United States Cir-

cuit Court, nor was that suit consolidated with any other by order of that Court.

Seventeenth. The proceedings to wind up the insolvent Company were in the Chancery Court, and the United States Circuit Court had no jurisdiction thereof and no decree of sale of the property could have been entered in the suit as removed thereto by defendant.

Eighteenth. The Foley-Williams Company suit vs. the Memphis Appeal Company was not included in the order of the Chancery Court consolidating certain actions. The part alleged to have been taken by the defendant in that suit had no relation to the proceedings pending in the consolidated action or to the accounts sold under the sale decree to Crawford, or to defendant's rights under the agency agreement. The money in question in this action was collected by the defendant in New York and retained there by him under the agreement and was not a fund in the hands of the Court in Tennessee or the receiver in the trust deed suit.

Nineteenth. Neither the legality of the decree of sale or the sale thereunder are the subject of attack by the record; the defendant's claim to immunity therefrom is based upon his rights as a third party claiming title to the proceeds of the collection of said accounts sold under the decree by virtue of his lien, claims and privileges established by the agency of agreement.

Twentieth. The defendant had no notice of an application for a decree of sale containing a provision guaranteeing title to purchasers

free and clear of incumbrances, liens or otherwise, nor does the record show that he had an opportunity of opposing the same.

Twenty-first. The defendant is not concluded by the decree of sale or the provisions therein guaranteeing to purchasers a title free and clear of all encumbrances, for want of notice to him of application therefor.

Twenty-second. If there be a federal question set up by the pleadings, it is as to the effect of the decree of sale, the guarantee of title therein, and the sale thereunder and this question is not necessary of decision by reason of the view of the Court of Appeals took of the rest of the case within the scope of the pleadings.

Twenty-third Even had defendant received notice of application for decree containing guarantee of free and clear title and such a decree had been entered on his default the record noes not show that any Court in Tennessee had adjudicated upon the agency agreement *or that any cause existed which could invalidate his rights thereunder*. A vested right cannot be v[illegible]ted by a collateral proceeding.

Twenty-fourth. The trust deed having been declared void on its face by both the Supreme Appellate Court of Tennessee and the Chancery Court therein, the accounts in question were the property of the company and not property belonging to the receiver, and were subject to the terms and conditions of the agency agreement, inclusive of defendant's lien thereunder.

Twenty-fifth. The contentions of the plaintiff in error before this Court must be found in and confined to his three assignments of error upon which the writ is based.

Finally.

(*a*) The rights of the defendant, the company and the receiver under the agency contract are not to be determined by this Court, the Court of Appeals having determined the same, and no decision of a federal question was necessary to such a determination.

(*b*) The only federal question, if any, presented by the pleadings being as to the effect of the sale decree and the sale thereunder, and no notice of application therefor having been given to defendant he is not concluded by such decree or sale.

(*c*) Therefore, the federal question alleged by plaintiff to be present in the case should be decided adversely to him by this Court.

The motion to dismiss and affirmed should be granted as prayed, or

The writ dismissed and the judgment affirmed on the merits.

All of which is most respectfully submitted.

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